UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 81

Docket No. SF-0432-11-0591-I-2

Gladys C. Towne,

Appellant,

v.

Department of the Air Force,

Agency.

October 28, 2013

DeLloyd Wilson, Smyrna, Georgia, for the appellant.

Basil R. Legg, Jr., Joint Base Andrews, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency petitions for review of an initial decision that reversed its action removing the appellant for unacceptable performance under 5 U.S.C. chapter 43. For the reasons set forth below, we GRANT the agency's petition for review, REVERSE the initial decision, and SUSTAIN the appellant's removal.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 The appellant was formerly the GS-5 Secretary in the Office of the Chief Nurse for the 60th Medical Group, located at Travis Air Force Base. Effective May 9, 2011, the agency removed the appellant from her position based on her unacceptable performance in five out of six "Duties" (i.e. critical elements) of her "Core Document" (i.e., performance standards). Initial Appeal File, MSPB Docket No. SF-0432-11-0591-I-1 (IAF 1), Tab 7 at 16, 18-19. Specifically, the agency asserted that the appellant's performance was unacceptable in the following critical elements: (1) prepares a wide variety of recurring and some nonrecurring correspondence, reports, and other documents and reviews and finalizes correspondence/documents prepared by others in handwritten or electronic drafts; (2) reviews and processes incoming and outgoing correspondence, materials, publications, regulations, and directives; (3) maintains supervisor's calendar, coordinates meeting arrangements, and schedules meetings and/or conferences; (4) performs other clerical and administrative work in support of the office/organization; and (5) uses varied and advance functions of word processing software to create, format, modify, edit, and print various documents. *Id*. at 21-25. The appellant filed an appeal in which she alleged, inter alia, that the removal action was not justified and constituted race discrimination and reprisal for prior equal employment opportunity activity. IAF 1, Tab 2, Tab 10 at 2. She requested a hearing in her appeal. IAF 1, Tab 2 at 3.

¶3 In reviewing the record after a two-day hearing, the administrative judge identified an apparent harmful error issue. She convened a teleconference and thereafter issued an initial decision in which she dismissed the appeal without prejudice. IAF 1, Tab 17, Initial Decision (ID 1). The administrative judge noted that the same agency manager had been both the proposing and deciding official in the appellant's case, but that statutory procedures seemed to require that the deciding official be someone in a higher position than the proposing official. ID 1 at 2. The administrative judge gave notice of the standards for proving a

harmful error claim and she ordered the parties to proffer evidence and argument as to whether the agency had committed a procedural error and, if so, whether the error was harmful. ID 1 at 3. She dismissed the appeal without prejudice to afford the parties the opportunity to address the matter. ID 1 at 1, 4-5.

¶4 The appeal was automatically refiled in due course and the parties submitted their evidence and argument. Initial Appeal File, MSPB Docket No. SF-0432-11-0591-I-2 (IAF 2), Tabs 3, 4, 5, 8, 9. After considering the parties submissions[2] as well as the record developed in the initial appeal, the administrative judge issued a decision in which she reversed the removal action. IAF 2, Tab 11, Initial Decision (ID 2). She found that the agency established that its performance appraisal system was approved by the Office of Personnel Management (OPM), the agency communicated the appellant's performance standards to her, and the agency showed that the appellant's performance was deficient in at least one of her critical elements. ID 2 at 4 n.3, 16. However, the administrative judge found that the agency did not show that it afforded the appellant a reasonable opportunity to improve because her performance improvement plan (PIP) period was not long enough for the appellant to demonstrate improved performance, she was not permitted by her standards to make mistakes, she was not afforded any assistance during the PIP, and the agency gave her a new assignment during the PIP that increased her workload. *Id.* at 17-19. The administrative judge also determined that the appellant did not prove her affirmative defense of race discrimination. *Id.* at 20-22. The administrative judge found that, in light of her ruling, she need not address whether the performance standards were valid or whether the agency committed harmful error. *Id.* at 19 n. 13, 22 n.15

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[2] The agency requested that the hearing be reconvened to allow for the presentation of testimony regarding the purported harmful error issue. IAF 2, Tab 7 at 3. The appellant declined a supplemental hearing on the issue of harmful error, and the administrative judge did not reconvene the hearing. *Id.*

¶5 The agency has petitioned for review.[3] PFR File, Tab 1. The appellant responds to the agency's petition for review,[4] and the agency replies to the appellant's response. *Id*., Tabs 3, 4.

ANALYSIS

¶6 To prevail in an appeal of a performance-based removal under chapter 43, the agency must establish by substantial evidence that: (1) the agency communicated to the appellant the performance standards and critical elements of her position; (2) the appellant's performance standards are valid under 5 U.S.C. § 4302(b)(1); (3) the agency warned the appellant of the inadequacies of her performance during the appraisal period and gave her an adequate opportunity to improve; and (4) after an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element.[5] *Lee v. Environmental Protection Agency*, 115 M.S.P.R. 533, ¶ 5 (2010); *see Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, ¶ 7 (2007). Substantial evidence is the "degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other

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[3] The administrative judge ordered the agency to afford the appellant interim relief should either party file a petition for review. ID 2 at 24. On review, the agency submitted uncontested evidence showing that it has complied with the interim relief order. Petition for Review (PFR) File, Tab 1 at 25-27.

[4] The appellant filed a document identified as a cross petition for review on the cover sheet, PFR File, Tab 3 at 1, but styled as a "response to petition for review" on the document itself, *id*. at 4. The appellant's submission raises no challenge to the initial decision and we find that the document is clearly a response to the agency's petition for review. Also, the appellant submits on review copies of documents that are already part of the record below as well as a proposed hearing exhibit that the administrative judge did not accept into evidence. PFR File, Tab 3 at 13-16. None of these documents are relevant to the issues before the Board on review.

[5] The agency also has the burden of proving that OPM has approved the agency's performance appraisal system and any significant changes thereto, if the appellant raises such a challenge. *Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶¶ 11-12 (1999). The appellant did not raise this issue in the instant case. ID 2 at 4 n.3.

reasonable persons might disagree." 5 C.F.R. § 1201.56(c)(1). Substantial evidence is a lesser standard of proof than preponderance of the evidence and, to meet this standard, the agency's evidence need not be more persuasive than that of the appellant. *Mahaffey*, 105 M.S.P.R. 347, ¶ 7.

Reasonable Opportunity to Demonstrate Acceptable Performance

¶7 Because the administrative judge found that the appellant was not afforded a reasonable opportunity to demonstrate acceptable performance and reversed the agency action on that basis, she did not address the other elements of the agency's burden of proof. We will address the correctness of the administrative judge's finding regarding the opportunity to demonstrate acceptable performance first prior to turning to the other elements of the agency's case.

¶8 Before initiating an action for unacceptable performance under 5 U.S.C. § 4303, an agency must give the employee a reasonable opportunity to demonstrate acceptable performance. *Greer v. Department of the Army*, 79 M.S.P.R. 477, 480 (1998). OPM's regulations governing performance-based actions under 5 U.S.C. § 4303 state, "[a]s part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance." 5 C.F.R. § 432.104; *see Gjersvold v. Department of the Treasury*, 68 M.S.P.R. 331, 336 (1995). The employee's right to a reasonable opportunity to improve is a substantive right and a necessary prerequisite to all chapter 43 actions. *Lee*, 115 M.S.P.R. 533, ¶ 32; *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 590 (1984). In determining whether the agency has afforded the appellant a reasonable opportunity to demonstrate acceptable performance, relevant factors include the nature of the duties and responsibilities of the appellant's position, the performance deficiencies involved, and the amount of time which is sufficient to enable the employee to demonstrate acceptable performance. *Lee*, 115 M.S.P.R. 533, ¶ 32; *Satlin v. Department of Veterans Affairs*, 60 M.S.P.R. 218, 225 (1993)

(the administrative judge properly considered the appellant's length of service and experience in concluding that the appellant had received both adequate instruction and time in which to demonstrate improvement).

¶9 The administrative judge found that the agency did not show that it afforded the appellant a reasonable opportunity to improve because the PIP was only 30 days long and included the winter holidays, and because of the "expansive nature of the PIP." ID at 2 at 16-17. The agency argues on review that the administrative judge erred by finding the PIP was too short to afford the appellant a reasonable opportunity to improve and by failing to consider all of the relevant factors in determining whether the appellant had a reasonable opportunity to improve. PFR File, Tab 1 at 13-16. We agree.

¶10 First, while the PIP was originally scheduled for 30 days, *see* IAF 1, Tab 7 at 116-121, the agency extended the PIP to take into account the leave the appellant took over the winter holidays. Hearing Compact Disc, October 13, 2011 (HCD 1), testimony of McDaniels; *see Gjersvold*, 68 M.S.P.R. at 336 (although the appellant complained that the agency improperly extended her PIP, the agency did so in order to afford the appellant additional time to demonstrate acceptable performance). The PIP was actually in place from December 15, 2010, to February 16, 2011. HCD 1, testimony of the appellant. Excluding the approximately two weeks of leave that the appellant took during this period, the PIP was approximately seven weeks in length. Moreover, the Board has found that a 30-day PIP can satisfy an agency's obligation to provide an employee with a reasonable opportunity to demonstrate acceptable performance. *Lee*, 115 M.S.P.R. 533, ¶ 33; *see Melnick v. Department of Housing & Urban Development*, 42 M.S.P.R. 93, 101 (1989) (30-day PIP for a GS-5 Secretary), *aff'd*, 899 F.2d 1228 (Fed. Cir. 1990) (Table); *Wood v. Department of the Navy*, 27 M.S.P.R. 659, 662-63 (1985) (30-day PIP for a GS-4 Military Personnel Clerk).

¶11 The agency correctly argues that the administrative judge failed to consider the nature of the appellant's duties and responsibilities when she found that the PIP was too short. PFR File, Tab 1 at 13-14. The appellant was the secretary to the Chief Nurse, Colonel Amy McDaniels. According to the appellant's position description and other evidence of record, her duties were typical secretarial duties: preparing correspondence and finalizing documents prepared by others; handling mail and maintaining files and updating copies of reference materials; handling visitors and telephone calls; maintaining her supervisor's calendar; doing other administrative and clerical tasks; and using office software to draft, format, and edit documents. IAF 1, Tab 7 at 127-29. The purpose of the appellant's position was to provide clerical and administrative support for the organization. *Id*. at 127.

¶12 In addition, the administrative judge did not consider the nature of the appellant's performance deficiencies. We agree with the agency that many of the appellant's deficiencies were obvious rather than subtle. *See* PFR File, Tab 1 at 14. For example, in preparing meeting minutes, the appellant typically used the minutes from the prior meeting as a template but she did not always delete language pertaining to the earlier meeting from her drafts. HCD 1, testimony of McDaniels; IAF 1, Tab 7 at 33-34, 36-37. Also, the appellant failed to include an item in the meeting minutes even after Col. McDaniels specifically instructed her by email to include the item. HCD 1, testimony of McDaniels; IAF 1, Tab 7 at 36. The appellant was also required to provide attachments to recipients of the meeting minutes, but on one occasion, she failed to provide 21 of 22 attachments. HCD 1, testimony of McDaniels; IAF 1, Tab 7 at 38.

¶13 The administrative judge described the PIP as "expansive," ID 2 at 17, but did not explain the reasoning behind her conclusion and we see no support for it.[6]

[6] To the extent that the administrative judge based her finding on the fact that the agency placed the appellant on a PIP for five critical elements, we are unaware of a

Likewise, the administrative judge found that the appellant had "myriad" tasks to perform, ID 2 at 19, but we see no evidence that any of the assignments were not an ordinary responsibility of a secretary in general or the appellant's position in particular. In finding that the duties that the appellant was expected to perform during the PIP were "expansive" and thus unreasonable, the administrative judge appears to be encroaching on the agency's discretion to determine the duties that make up a position. *Thompson v. Department of the Navy*, 89 M.S.P.R. 188, ¶ 5 (2001) (an agency may exercise management discretion in establishing performance standards).

¶14 The administrative judge referred to two assignments that she characterized as outside the normal range of the appellant's duties. ID 2 at 18. The first was inprocessing and outprocessing duties that the appellant had not been required to perform in some time. However, these duties were entirely routine clerical tasks consistent with the duties of the appellant's secretary position. For inprocessing incoming military officers, the appellant was required to schedule a meeting with Col. McDaniels or her deputy within 30 days of arrival, update group mailing lists, create an Officer Professional Development (OPD) folder, and add the new arrival to the OPD spreadsheet. IAF 1, Tab 12 at 55. Outprocessing involved essentially reversing the inprocessing tasks. *Id.*

¶15 The second "new" assignment identified by the administrative judge was to finalize revisions to a Medical Group Instruction (MGDI). ID 2 at 18. The record shows that on December 17, 2010, Col. McDaniels provided the appellant with an email with instructions and attached documents containing the various edits.[7] IAF 1, Tab 26, Agency Exhibit 6. The appellant was supposed to open the

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reason why an agency cannot place an employee on a PIP for all of the critical elements in which the employee's performance is deficient.

[7] The appellant contended that Col. McDaniels intentionally took on this project to disadvantage her. Colonel McDaniels testified that revising the MGDI was a continuous process that was rotated among the various offices at the facility, and it

electronic copy of the master document and type in the changes contained in the attachments. Colonel McDaniels testified that this was a simple typing and cut-and-paste project that should have taken no more than half a day to complete, but the appellant was unable to complete it at all during the PIP. Hearing Compact Disc, October 14, 2011 (HCD 2), testimony of McDaniels. The appellant disputed the agency's evidence that she need only cut and paste by asserting that cutting and pasting sometimes disrupted the formatting of the master document. HCD 1, testimony of the appellant. Since the appellant contended that she was competent at using the software she needed to perform her job duties, HCD 1, testimony of the appellant, it is not clear why the appellant would be unable to make any needed corrections to the formatting. In any event, if the formatting problem proved to be insurmountable, then the appellant could have typed in the changes.

¶16 We find that the MGDI assignment involved simple clerical tasks that were well within the duties of the appellant's position even if she had not worked on prior versions of the same document before. IAF 1, Tab 7 at 126-132. The appellant had difficulty completing the task because she deleted Col. McDaniels' original email containing the attachments, HCD 1, testimony of the appellant, and she had difficulty overcoming her resentment[8] at being assigned this task in the first place. However, we see no justification for the administrative judge's

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happened to be her office's turn. Hearing Compact Disc, October 14, 2011, testimony of McDaniels.

[8] The appellant denied any resentment, but repeatedly testified that the assignment was not her job and she suggested that the office that made the greatest number of corrections should have been responsible for finalizing the document and not her. HCD 1, testimony of the appellant. The appellant also testified that the agency was unreasonable to expect her to finish the task quickly because management had been working on the project for months before the appellant was asked to finalize it. HCD 1, testimony of the appellant. Even if agency management had been working on the revisions for some time, we fail to see how that fact excuses the appellant's failure to make the final edits to the document in a timely fashion.

implied finding that this work assignment was inconsistent with the appellant's regular duties or that the appellant was so overburdened with work that she could not have completed this task within the period during which the PIP was in place. Even the appellant admitted at the hearing that the MGDI was merely a document in Microsoft Word and the assignment involved only typing. HCD 1, testimony of the appellant.

¶17 The administrative judge also found that the agency provided the appellant with "minimal to nonexistent assistance." ID 2 at 17. The agency is required by regulation to offer the appellant assistance in improving her performance as part of her opportunity to demonstrate acceptable performance. 5 C.F.R. § 432.104. However, there is no mechanical requirement regarding the form this assistance must take. *Goodwin v. Department of the Air Force*, 75 M.S.P.R. 204, 208 (1997) (*citing Gjersvold*, 68 M.S.P.R. at 336).

¶18 The administrative judge did not explain why she found that the agency provided only "minimal to nonexistent assistance" and we see little support for her conclusion in the record. ID 2 at 17. Colonel McDaniels provided the appellant with detailed written guidelines, including the PIP itself and numerous emails during the PIP about the appellant's performance on specific tasks. IAF 1, Tab 7 at 30-63, 66-114, 116-121. She met with the appellant and provided her written feedback at the beginning of the PIP and midway through the PIP. HCD 1, testimony of McDaniels, testimony of the appellant; IAF 1, Tab 25, Agency Exhibit 2. The appellant provided written comments responding to Col. McDaniels' feedback during the midpoint meeting. IAF 1, Tab 18 at 5-6. Colonel McDaniels met with the appellant approximately every two weeks during the PIP to provide the appellant feedback and respond to the appellant's occasional questions. HCD 1, testimony of McDaniels.

¶19 The agency also offered the appellant internal training in the software that the agency used and gave her a course catalog for no-cost community college courses. HCD 2, testimony of McDaniels. The appellant refused all offers of

training because, as she testified, "I knew what I was doing and didn't see the point of training." HCD 1, testimony of the appellant. In fact, the appellant testified that she knew how to perform every duty identified in the PIP. HCD 1, testimony of the appellant.

¶20 The Board has found that an agency may meet its obligation to offer assistance by means other than meeting personally during the PIP. *See Gjersvold*, 68 M.S.P.R. at 336 ("the agency's detailed guidance regarding the appellant's performance during the PIP suffers no disqualification merely because it was delivered in written form, rather than orally"). Here, not only did the agency provide the appellant with detailed written feedback, it also had regular meetings with her during the PIP. This degree of assistance is greater than that which the Board has found sufficient to meet an agency's obligation to offer assistance. *See Goodwin*, 75 M.S.P.R. at 208-09 (the agency afforded the appellant a reasonable opportunity to improve where it gave her a detailed PIP letter and abundant written feedback during the PIP, and her supervisor made herself available to provide assistance but the appellant did not request further assistance); *Gjersvold*, 68 M.S.P.R. at 335-36 (the agency afforded the appellant a reasonable opportunity to improve where her supervisor provided her with 12 written evaluations during the PIP and solicited the appellant's questions and responses to the evaluations, which the appellant declined to provide). We find, therefore, that the agency has proffered substantial evidence showing that it afforded the appellant a reasonable opportunity to improve.

Validity of Standards

¶21 Having found that the agency provided the appellant with a reasonable opportunity to improve, we now address the remaining elements of the agency's case. Performance standards must, to the maximum extent feasible, permit the accurate appraisal of performance based on objective criteria. 5 U.S.C. § 4302(b)(1); *Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1335-36

(Fed. Cir. 2004). Standards must be reasonable, realistic, attainable, and clearly stated in writing. *Thomas*, 95 M.S.P.R. 123, ¶ 12; *Greer*, 79 M.S.P.R. at 483. Performance standards should be specific enough to provide an employee with a firm benchmark toward which to aim her performance, *Greer*, 79 M.S.P.R. at 483, and must be sufficiently precise so as to invoke general consensus as to their meaning and content, *Henderson v. National Aeronautics & Space Administration*, 116 M.S.P.R. 96, ¶ 20 (2011). Performance standards are not valid if they do not set forth the minimum level of performance that an employee must achieve to avoid removal for unacceptable performance under chapter 43. *Henderson*, 116 M.S.P.R. 96, ¶ 9.

¶22 The administrative judge found, and the parties do not dispute, that the agency communicated the appellant's performance standards to her on several occasions. ID 2 at 16. We also note that the standards set forth in the PIP were the same standards that had been contained in her position description for several years. *Compare* IAF 1, Tab 7 at 116-21 *with* IAF 1, Tab 7 at 126-32. The agency used a two-tiered rating system in which the possible ratings were "meets" and "does not meet," and the standards identify the level of performance the appellant had to achieve to reach the "meets" level. IAF 1, Tab 7 at 126-31. For example, under critical element 5, "Performs other clerical and administrative work in support of the office/organization," the standards provided, inter alia, "Typically establishes, maintains, and updates file system accurately to enable quick and efficient retrieval of information." *Id.* at 129. The Board has found that an agency's use of words such as "sometimes," "rarely," "frequent," and "generally" do not automatically render a standard impermissibly vague. *See Satlin*, 60 M.S.P.R. at 223-24; *Dancy v. Department of the Navy*, 55 M.S.P.R. 331, 335 (1992); *Rupp v. Department of Health & Human Services*, 51 M.S.P.R. 456, 465 (1991); *aff'd*, 991 F.2d 810 (Fed. Cir. 1993) (Table). Similarly, we find that the word "typically" is not so vague as to invalidate the performance standard.

¶23 In any event, when performance standards are vague on their face, the agency may cure the defect by fleshing out the standards thorough additional oral or written communication. *See Dancy*, 55 M.S.P.R. at 335 (citing *Eibel v. Department of the Navy*, 857 F.2d 1439, 1443 (Fed. Cir. 1988)). Here, any lack of specificity inherent in the appellant's performance standards was cured by the agency's provision of clear guidance in the PIP letter and throughout the PIP as to what was expected of her. *See DiPrizio v. Department of Transportation*, 88 M.S.P.R. 73, ¶ 12 (2001). For example, under the first critical element, the appellant's performance standard provided: "Documents are routinely finalized in a timely manner, meeting prescribed suspense dates or established deadlines." IAF 1, Tab 7 at 127. The agency fleshed out this standard in the PIP notice as follows: "Accurately finalize and route documents by established suspense dates of 5 days following meetings for draft minutes and and [sic] 10 days prior to meeting [sic] for agendas." IAF 1, Tab 7 at 117. Another example appears under critical element 4: "Typically maintains calendar efficiently and promptly informs supervisor of any changes or conflicts." IAF 1, Tab 7 at 128. In the PIP notice, the agency fleshed out this standard thusly:

> Schedule appointments and meetings without prior approval in accordance with supervisor's policies and priorities, and coordinate with supervisor as necessary. This includes all newly assigned nurses and nuses [sic] scheduled for career counseling. Inform supervisor of conflicts and reschedules appointments when it is clear that the supervisor will not be able to make all commitments. If a supervisor can't attend a scheduled meeting, contact an alternate person when necessary. No more than one incorrect entry will be acceptable per week.

Id. at 118. Although we do not explicitly address each relevant standard here, we have carefully reviewed them and find that they are all substantially similar to the examples mentioned here, requiring the same analysis and leading to the same conclusion. We find that the agency has shown by substantial evidence that the appellant's performance standards are reasonable, realistic, attainable, reasonably

objective, and tailored to the specific requirements of the position. *See Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13, ¶ 13 (2004); *Thomas*, 95 M.S.P.R. 123, ¶ 12. Thus, the agency has met its burden of proving by substantial evidence that the appellant's performance standards are valid.

Adequacy of Performance

¶24 We now turn to the adequacy of the appellant's performance. An agency's burden of providing substantial evidence of an appellant's unacceptable performance can be met largely by submissions of documentation through the charges and the appellant's working papers. *Fernand v. Department of the Treasury*, 100 M.S.P.R. 259, ¶ 10 (2005), *aff'd*, 210 F. App'x 992 (Fed. Cir. 2006); *Salter v. Department of the Treasury*, 92 M.S.P.R. 355, ¶ 12 (2002). A proposal notice can constitute valid proof of an agency's charges, where the notice is not merely conclusory, but sets forth in detail an employee's errors and deficiencies, and where the notice is corroborated by other evidence. *Fernand*, 100 M.S.P.R. 259, ¶ 10.

¶25 As mentioned previously, the agency maintained that the appellant's performance was unacceptable under the critical element of her position that required her to prepare a wide variety of recurring and some nonrecurring correspondence, reports, and other documents and reviews and finalize correspondence/document prepared by others in handwritten or electronic drafts. IAF 1, Tab 7 at 21-23. Specifically, in support of its allegation of unacceptable performance under this critical element, the agency pointed to deficiencies in the appellant's preparation of documents related to the December 2010 and January 2011 Nursing Executive Council meetings. *Id.* at 22. The record supports the claim that the appellant's documents contained numerous grammatical, spelling, and formatting errors, the appellant neglected to delete information from the prior meeting's minutes in several places, failed to attach numerous attachments, and made several errors regarding attendance at the

meetings. HCD 1, testimony of McDaniels; IAF 1, Tab 7 at 22-23, 30-343. In addition, the agency noted and the record shows that the appellant failed to timely prepare minutes and the agenda for the meetings described above and other meetings. HCD 1, testimony of McDaniels; IAF 1, Tab 7 at 22-23, 40, 49, 60.

¶26 The agency also alleged that the appellant's performance was unacceptable under the critical element of her position that required her to review and process incoming and outgoing correspondence, materials, publications, regulations, and directives. IAF 1, Tab 7 at 23-24. The record supports the agency's claim that the appellant failed to maintain her email account with the result that her inbox became full and some messages were returned to the sender. HCD 1, testimony of McDaniels; IAF 1, Tab 7 at 24, 47, 59. The record also shows that the appellant failed to check for electronic correspondence on a daily basis as required, she failed to process outgoing mail timely, and she did not update the office's electronic suspense tracker. HCD 1, testimony of McDaniels; IAF 1, Tab 7 at 24, 52-58, 61-63.

¶27 In addition, the agency also alleged that the appellant failed to maintain her supervisor's calendar, coordinate meeting arrangements, and schedule meetings and/or conferences as required by a critical element of her performance standards. IAF, Tab 7 at 24-25. In support of its allegations of unacceptable performance under this critical element, the agency pointed to and the record supports the appellant's failure to accurately keep the office Career Counseling Tracker up to date and to schedule initial and annual career counseling so that Col. McDaniels could provide subordinate military officers with counseling in a timely manner.[9] HCD 1, testimony of McDaniels; IAF 1, Tab 7 at 25, 67-74, 77-80, 85-90, 99-114. Further, the appellant scheduled a meeting for Col. McDaniels with a

[9] Colonel McDaniels explained that, in a manner of speaking, every military officer's job is to get promoted to the next rank, so these counseling sessions, which are similar to performance reviews, are mandatory and must occur within certain timeframes. HCD 1, testimony of McDaniels.

Lieutenant Appleton and when Col. McDaniels attempted to prepare for that meeting, she discovered that there was no such person in the command; the appellant should have indicated that the meeting was with a Lieutenant Stapleton.[10] HCD 1, testimony of McDaniels, testimony of the appellant; IAF 1, Tab 7 at 66.

¶28 In addition to the performance deficiencies set forth above, the agency alleged that the appellant's performance was unacceptable in the critical element of her position that required her to perform other clerical and administrative work in support of the office/organization. IAF 1, Tab 7 at 25-26. Among other things, the agency alleged and the record shows that the appellant failed to maintain and update office file systems and failed to maintain an email address list of all nurses within the medical group. *Id.* at 26, 81-83. The appellant also failed to keep outside employment files current.[11] HCD 1, testimony of McDaniels; IAF 1, Tab 7 at 44-46.

¶29 Finally, the agency alleged that the appellant's performance was unacceptable in the critical element of her position that required her to use varied and advance functions of word processing software to create, format, modify, edit, and print various documents. *Id*. at 26-27. To demonstrate the appellant's unacceptable performance under the critical element, the agency pointed to various performance deficiencies set forth above involving word processing and the appellant's failure to incorporate edits into the MDGI in approximately two

[10] The appellant saw Lt. Stapleton when she scheduled the meeting, but could not read her identification badge and so guessed at the name rather than asking. HCD 1, testimony of McDaniels.

[11] Colonel McDaniels explained that there are restrictions on how many consecutive hours a nurse can be on duty and current outside employment files were essential in monitoring nurses' outside employment, meeting documentation requirements, and ensuring compliance with these restrictions. HCD 1, testimony of McDaniels.

months, even though the assignment required only about a half-day of simple typing and basic word processing.[12] HCD 2, testimony of McDaniels.

¶30 The appellant provided a number of explanations for her errors. For example, she alleged that she had difficulty finding uninterrupted time to do her work because she constantly had to deal with visitors to the suite, who naturally gravitated towards her as she was the closest to the door. HCD 1, testimony of the appellant. The agency offered to move her work station to somewhere quieter, however, but the appellant declined to move.[13] HCD 2, testimony of McDaniels. To the extent the appellant asserted that she missed deadlines because she was on leave, we note that the agency only counted days which the appellant was present in calculating deadlines, and all of the above discussions of untimely work product account for the appellant's leave. HCD 1, testimony of the appellant. We have already discussed above the appellant's claim that she had difficulty completing the MGDI because she deleted the email containing Col. McDaniels' instructions and the edits she was supposed to incorporate.

¶31 The appellant asserted that she did not have unlimited storage space associated with her email account and did not spend time on her return from leave reviewing the email that had accumulated in her inbox because she gave a higher priority to other tasks. HCD 1, testimony of the appellant. However, the record

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[12] While not raised by the appellant, we recognize that there appears to be some overlap between the appellant's performance that formed the basis for finding her unacceptable under this critical element and the performance that formed the basis for finding her unacceptable under other critical elements. We need not decide whether the same instances of poor performance can be used to find an employee unacceptable under more than one critical element because the finding of unacceptable performance under each critical element is fully and independently supported by the record in this case. Furthermore, failure to demonstrate acceptable performance under a single critical element will support a removal under chapter 43. *Stein-Verbit v. Department of Commerce*, 72 M.S.P.R. 332, 339-40 (1996).

[13] Another reason the appellant had difficulty completing her work was that she spent an inordinate amount of time on the telephone with personal calls, for which she was reprimanded during the PIP. HCD 2, testimony of McDaniels; *see* HCD 1, testimony of the appellant.

reflects that the appellant's electronic inbox was full and rejecting incoming messages on January 19, a full week after the appellant returned from leave. IAF 1, Tab 7 at 59. She further asserted that the meeting agendas were kept on a shared drive and were always available to everyone whether she completed them on time or not. HCD 1, testimony of the appellant. Yet an outdated agenda for a meeting that has already taken place is of no value to those who might look for the new agenda on the shared drive so they could prepare for a future meeting. The appellant also testified that Col. McDaniels deleted electronic documents, removed physical files, and inserted errors into the appellant's written work so she could later accuse the appellant of poor performance. HCD 2, testimony of the appellant. We see no evidentiary support for this claim and we reject it as frivolous.

¶32 As the above discussion illustrates, the agency has submitted numerous examples of the appellant's unacceptable performance. We have not, however, relied on all of the agency's allegations regarding the appellant's preparation of meeting minutes. For example, some employees attended these meetings in place of others or in more than one capacity and the appellant was expected to account for this when listing the attendees and the offices which they represented. The appellant was also required to distinguish between old business, new business, and standard agenda items, and to report them in different sections of the meeting minutes. In other words, the appellant had to have had some basic understanding of the substantive content of the meetings to prepare accurate minutes in accordance with her supervisor's expectations. We find that Col. McDaniels' testimony concerning these matters was confusing and we are not persuaded that the agency met its burden of proof regarding the substantive elements of the meeting minutes. HCD 1, testimony of McDaniels. On the other hand, as discussed above the agency has shown unacceptable performance concerning errors in the meeting minutes that were entirely clerical in nature such as those listed above.

¶33 The agency has not proven all of its allegations of unacceptable performance. The Board has held that where an employee is removed on the basis of fewer than all the components of a performance standard for a critical performance element, the agency must present substantial evidence that the employer's performance warranted an unacceptable rating on the performance element as a whole. *Fernand*, 100 M.S.P.R. 259, ¶ 8; *Leonard v. Department of Defense*, 82 M.S.P.R. 597, ¶ 6 (1999). We find that the agency here has presented sufficient evidence to show by substantial evidence that the appellant's performance was unacceptable in the five critical elements relied on by the agency, even though it did not prove every allegation it raised.

Affirmative Defenses

¶34 The administrative judge sua sponte recognized a potential harmful error claim and reopened the record for evidence and argument addressing the issue. IAF 2, Tab 7. She did not, however, address harmful error in the initial decision in light of her disposition of the case. ID 2 at 22 n.15. Because the parties have had the opportunity to submit evidence and argument on the issue of harmful error, and because the appellant waived her right to a supplemental hearing on this issue, *see* IAF 2, Tab 7 at 3, we address the claim here.

¶35 Even where the agency meets its burden of proof, the action may not be sustained if the appellant shows that the agency committed harmful error. 5 U.S.C. § 7701(c)(2)(A); *Tom v. Department of the Interior*, 97 M.S.P.R. 395, ¶ 42 (2004). Reversal of an action for harmful error is warranted where the procedural error likely had a harmful effect on the outcome of the case before the agency. *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 47 (2007); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991). In order to show harmful error, the appellant must prove that any procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

Pinegar, 105 M.S.P.R. 677, ¶ 47; *Stephen*, 47 M.S.P.R. at 685. The appellant bears the burden of proving harmful error. *Pleasant v. Department of Housing & Urban Development*, 98 M.S.P.R. 602, ¶ 8 (2005).

¶36 By statute, except when a performance-based action is proposed by the agency head, the agency cannot take the action unless it has been concurred in by an official at a higher level than that of the proposing official. 5 U.S.C. § 4303(b)(1)(D)(ii). Colonel McDaniels was both the proposing and deciding official in this action. IAF 1, Tab 7, Subtabs 4b-4c. The agency asserts that it nevertheless met the requirements of the statute because the commander of the 60th Medical Group reviewed the removal decision and concurred in the removal decision before the effective date of the removal. IAF 2, Tab 9 at 15-18. The agency submitted a sworn statement signed under penalty of perjury from the commander, Colonel Brian P. Hayes, in support of its position. IAF 2, Tab 9 at 21-23. Colonel Hayes attested that he did not participate in the decision to remove the appellant; Col. McDaniels arrived at her decision independently with no input from him; Col. McDaniels notified the commander of her decision once it had been made; the appellant requested review of the decision via email; and the commander reviewed the decision and concurred in it via email dated May 6, 2011.[14] IAF 2, Tab 4 at 4-6, Tab 9 at 21-23. The removal did not become effective until May 9, 2011. IAF 1, Tab 7 at 16, 18.

¶37 We are not entirely convinced that this was the process Congress had in mind. We need not decide, however, whether the agency is in technical, even accidental, compliance with the statute or whether instead it has committed a procedural error, because the appellant has not shown that the error, if it exists, affected the outcome of her case.

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[14] The appellant asserted below that the copy of the email in question is not authentic because it was not printed from Col. Hayes' email account. IAF 2, Tab 5 at 3. We do not agree; the email is clearly from Col. Hayes' email account, and was printed by one of the recipients of the email. IAF 2, Tab 4 at 4.

¶38 In his declaration, Col. Hayes attested that the appellant's request for his review contained numerous errors that reinforced his understanding that the appellant's performance as a secretary was unacceptable, and that he would have reached the same decision if he had been asked to concur in the removal before the decision as opposed to upon the appellant's request. Tab 9 at 22-23. The appellant's bare assertion that she was harmed is insufficient to overcome the agency's evidence that it would have reached the same result in the absence of any procedural error. *Cf. Salter*, 92 M.S.P.R. 355, ¶¶ 12-13 (the appellant's bare allegation that the agency's delay in bringing action against him prejudiced the presentation of his case, without proof, was insufficient to show laches). We find, therefore, that the appellant has not proven by preponderant evidence that the agency committed harmful error.[15]

ORDER

¶39 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

[15] The administrative judge found that the appellant failed to prove her affirmative defense of race discrimination. ID 2 at 20-22. The appellant has not asserted that the administrative judge's findings in this regard were incorrect, and we see no reason to disturb them. *Fernand*, 100 M.S.P.R. 259, ¶ 5 n.2.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If

you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.